

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHEL TOLIVER,

Plaintiff,

-v-

NEW YORK CITY DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

MICHEL TOLIVER,

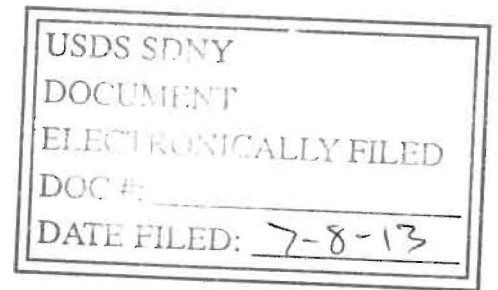
Plaintiff,

-v-

P.H.S. CORP. AND MENTAL HEALTH-
KEPPLINPHILLIPS, *et al.*

Defendants.

No. 10 Civ. 822 (RJS) (JCF)
No. 10 Civ. 5355 (RJS) (JCF)
ORDER ADOPTING REPORT AND
RECOMMENDATION



RICHARD J. SULLIVAN, District Judge:

Plaintiff brings these actions *pro se* under 42 U.S.C. § 1983 against the New York City Department of Corrections (“DOC”), DOC Commissioner Schiro (the “Commissioner”), the DOC Chief of Department (the “Chief”), Warden Mulvey, Warden Duffy, Warden Donovan, Corrections Captain Cavalli, Corrections Captain Merced, Corrections Officer Stultz, Corrections Officer Smith, Corrections Officer Cherry, Captain Caputo, Captain Gates, Corrections Officer Roman, Kippling Phillips (sued herein as “P.H.S. Corp. and Mental Health – Kepplinphillips”), Corrections Officer Bond, and Corrections Officer Cabbie. Plaintiff asserts that he was assaulted by corrections officers on two occasions and that he was deprived of due

process with respect to various infractions and with respect to his placement in enhanced security status. By Order dated August 23, 2012, the Court consolidated these actions and referred them to the Honorable James C. Francis, IV, Magistrate Judge, for pretrial purposes and for a Report and Recommendation (“R&R”) on Defendants’ contemplated motion for summary judgment. Defendants moved for partial summary judgment on September 14, 2012 (Doc. No. 128), and their motion was fully briefed three months later, on December 14, 2012 (Doc. No. 149).

On January 25, 2013, Judge Francis issued the attached R&R, recommending that the Court grant Defendants’ motion for partial summary judgment except with respect to Plaintiff’s § 1983 claims of unreasonable force against Captain Cavalli arising out of the December 11, 2009 incident and against Officer Stultz, Officer Smith, and Captain Merced arising out of the May 20, 2010 incident. The R&R also recommended denying Plaintiff’s motion to amend his pleading to add Nicholas Pantea as a defendant. In the R&R, Judge Francis advised the parties that failure to file timely objections to the R&R would constitute a waiver of those objections. *See* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). No party has filed objections to the R&R, and the time to do so has long since expired. *Cf. Frank v. Johnson*, 968 F.2d 298 (2d Cir. 1993).

When no objections to an R&R are made, the Court may adopt it if there is no clear error on the face of the record. *Adee Motor Cars, LLC v. Amato*, 388 F. Supp. 2d 250, 253 (S.D.N.Y. 2005); *La Torres v. Walker*, 216 F. Supp. 2d 157, 159 (S.D.N.Y. 2000). After reviewing the record, the Court finds that Judge Francis’s well-reasoned R&R is not facially erroneous. Accordingly, the Court adopts the R&R in its entirety, and for the reasons set forth therein, (1) dismisses the claims against the DOC, the Commissioner, the Chief, Warden Duffy, Warden Mulvey, Deputy Warden Donovan, Officer Bond, Kippling Phillips, and the John and Jane Doe Defendants; (2) grants summary judgment to Defendants as to the claims against Captain

Caputo, Officer Roman, Captain Gates, Officer Cherry, and Officer Cabbie; and (3) dismisses any state law claims that Plaintiff's Amended Complaint can be construed to assert. Because disputes of fact remain as to Plaintiff's § 1983 claims of unreasonable force against Captain Cavalli, Officer Stultz, Officer Smith, and Captain Merced, IT IS HEREBY ORDERED THAT, by July 12, 2013, Defendants shall submit a letter to the Court regarding whether they wish to proceed to trial and, if so, proposing a schedule for trial and pre-trial submissions.

SO ORDERED.

DATED: July 8, 2013
New York, New York



RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

A copy of this Order has been mailed to:

Michel Toliver
10-A-4565
Five Points Correctional Facility
State Route 96
P.O. Box 119
Romulus, NY 14541